Supreme Court, U.S.
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No. 98-622

In The

Supreme Court of the United States

October Term, 1998

WILLIAM B. FALOW,

Petitioner,

vs.

NEW YORK STATE GRIEVANCE COMMITTEE
FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Appellate Division, Second Judicial Department of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

This brief is submitted in opposition to petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated June 23, 1997 which sustained eighteen charges of professional misconduct, in toto, and a nineteenth charge of professional misconduct, in part, and disbarred petitioner from the practice of law (Petitioner's App., 1a). *Matter of Falow*, 231 A.D. 2d 201 (2d Dept. 1997). After a *sua sponte* examination, based upon arguments presented by petitioner and opposition by respondent, the Court of Appeals of the State of New York, by order dated October 23, 1997, dismissed petitioner's appeal as of right, upon the ground that no substantial constitutional question was directly involved (Petitioner's App., 8a). *Matter of Falow*, 90 N.Y. 2d 1007 (1997).

The Appellate Division, Second Judicial Department, by order dated April 21, 1998, denied petitioner's motion for leave to appeal (Petitioner's App., 10a). Similarly, on July 9, 1998, the Court of Appeals denied petitioner's motion for leave to appeal (Petitioner's App., 11a). *Matter of Falow*, 92 N.Y. 2d 806 (1998).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On November 2, 1990, respondent moved before the Appellate Division by Order to Show Cause, pursuant to 22 NYCRR § 691.4(l)(1), (Petitioner's App., 37a), for an order

authorizing a disciplinary proceeding against petitioner and suspending him from the practice of law pending the outcome of such proceeding. Petitioner opposed this application. By order of the Appellate Division, dated June 10, 1991, prosecution of a disciplinary proceeding was authorized and petitioner was suspended from the practice of law pending the outcome of that proceeding (Petitioner's App., 54a).

By Order to Show Cause, dated July 8, 1991, petitioner sought reargument of the order of suspension and urged that said suspension be vacated or modified. By order of the Appellate Division, dated August 19, 1991, reargument was granted and, upon reargument, that branch of the motion seeking petitioner's suspension from the practice of law pending the outcome of a disciplinary proceeding was denied and he was reinstated to the practice of law (Petitioner's App., 56a).

On May 6, 1992, a Notice of Petition and Petition were personally served on petitioner. Said Petition contained thirty charges of professional misconduct. Petitions were also served on two other attorneys involved with petitioner regarding the transactions which served as the bases of the charges against them. Simultaneously, respondent brought a motion for a joint hearing with petitioner and the two other attorneys. At the request of petitioner and the two other attorneys, Answers to the Petitions were held in abeyance pending the decision on the joint hearing motion. By order dated November 9, 1992, the motion for a joint hearing was denied.

By Order to Show Cause dated December 10, 1992, petitioner sought an order *inter alia*, dismissing the Petition against himself and one of the other attorneys. He alleged *ex parte* communications by respondent with the Court and that the Appellate Division maintained a "private file" on him. He sought depositions of counsel to respondent and court personnel.

By Order to Show Cause, dated January 8, 1993, petitioner sought an order *inter alia*, vacating the order of June 10, 1991 which authorized the commencement of a disciplinary proceeding, dismissing all charges, seeking a copy of an order to disclose and the papers upon which it was issued and disclosure to him of what he alleged was a "private file" maintained by the Appellate Division.

On April 15, 1993, the Appellate Division issued orders denying in their entirety both applications brought by petitioner and extending his time to submit an answer to ten days after receipt of the order denying the first application (Petitioner's App., 52a, 60a).

By order dated April 15, 1993, the Appellate Division referred the issues raised by the Petition and petitioner's expected Answer to the Honorable George J. Balbach, a retired Justice of the Supreme Court, Queens County, to hear and report, together with his findings on the issues (Petitioner's App., 60a). On or about May 4, 1993, petitioner served his Answer to the Petition.

On or about May 17, 1993, petitioner made a motion for leave to appeal to the Court of Appeals based on several of the same issues raised in his instant appeal. By order dated July 9, 1993, this was dismissed (Petitioner's App., 62a).

Prehearing conferences before the Honorable George J. Balbach were held on September 9 and October 25, 1993, at the offices of respondent. The hearing of the disciplinary proceeding took place before the Honorable George J. Balbach at the Richard A. Daranco Courthouse, White Plains, New York. The hearing commenced on January 25, 1994 and concluded on December 28, 1995.

During the hearing of the disciplinary proceeding, petitioner brought another motion before the Appellate Division seeking *inter alia* the issuance of subpoenae for records maintained by the Clerk of the Court and for the appearance of counsel to respondent and court personnel. The motion was denied by order dated March 3, 1995.

Petitioner's counsel then served subpoenae on the same designated individuals causing the respondent to move before the Special Referee to quash the subpoenae. The Special Referee granted the motion to quash.

Proposed Findings and Replies were fully submitted to the Honorable George J. Balbach by April 3, 1996. Due to the death of the Honorable George J. Balbach, by order dated May 6, 1996, the Petition and Answer in this disciplinary proceeding were referred to the Honorable John A. Monteleone (Petitioner's App., 64a). Petitioner, as is his practice, now falsely and deliberately accuses the Special Referee of concealing from the parties that his report would only be based upon his review of the transcripts and exhibits generated by the previous hearings. The order clearly put the parties on notice that the Special Referee was to review the record of the proceedings, *to hold such further hearings, if any, as in his discretion were necessary to enable him to make findings on the issues raised* by the pleadings and to report his findings on the issues. (Emphasis added).

By Report, dated August 30, 1996, and received by the respondent on September 19, 1996, the Honorable John A. Monteleone issued his findings in this disciplinary proceeding. On or about September 24, 1996, respondent brought a motion to confirm, in part, and to disaffirm, in part, the Report of the Special Referee.

Petitioner sought by Order to Show Cause, dated October 15, 1996, to vacate the Report of the Special Referee, to direct a hearing *de novo*, and to stay the Committee's pending motion to confirm/disaffirm. On or about October 25, 1996, petitioner brought a cross-motion to affirm/disaffirm the Report of the Special Referee.

By order dated January 14, 1997, petitioner's application seeking to vacate the Report of the Special Referee, to direct a hearing *de novo*, and to stay respondent's pending motion to confirm/disaffirm was denied. By order dated June 23, 1997, the Appellate Division sustained Charges 2, 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 18, 19, 23, 25, 27, 28, 20 and Charge 26 solely with respect to failing to account for clients' and third parties' funds. Charges 1, 6, 11, 17, 21, 22, 24 and 30 were not sustained. Petitioner was disbarred from the practice of law, effective immediately (Petitioner's App., 66a).

Thereafter, petitioner filed a notice of appeal and motions for leave to appeal which were denied.

Petitioner claims that his defense was impaired by delay and the length of the hearings. Any delays in investigating the complaints of professional misconduct and in prosecuting the disciplinary proceeding were directly attributable to petitioner. He provided false and misleading answers to the original complaints, gave false and misleading testimony under oath, brought on numerous, repetitive and frivolous motions, made several applications for interlocutory appeals, initiated federal actions and sought numerous adjournments during the hearing of the disciplinary proceeding.

REASONS FOR DENYING THE WRIT

JURISDICTION ON WRIT OF CERTIORARI IS NOT WARRANTED IN THIS MATTER.

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Writ of Certiorari" and, in relevant part, states:

> 1. A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

United States Supreme Court Rule 10.

Although Rule 10.1 is not exhaustive, the facts of the instant matter do not even remotely relate to the "character of reasons" that this Court will consider for a petition for a writ of certiorari.

The issues involved in the instant matter do not reach the constitutional dimensions to be addressed by the United States Supreme Court. Petitioner has continually misstated the facts and attempted to manufacture issues by couching them in terms of "due process." Petitioner's real objection is that, despite his strenuous efforts, he has been prevented from completely obstructing the disciplinary process and is now disbarred.

The New York State Court of Appeals in its decision denying appeal as of right, clearly apprehended that no substantial constitutional question is directly involved. Both that court and the Appellate Division have dealt with petitioner's arguments on numerous occasions and have correctly determined that the claims raised by petitioner are meritless. Since none of the arguments advanced by petitioner involves important questions of federal law that have not been, but should be, settled by this Court, further consideration of petitioner's claims by this Court is not warranted.

I.

PETITIONER'S CONTENTION THAT THE VARIOUS DISCIPLINARY FUNCTIONS WERE COMBINED IN VIOLATION OF DUE PROCESS IS WITHOUT MERIT.

This Court has long recognized that it rests exclusively with the courts, who may be admitted to the practice of law as an attorney, who may be removed from the practice of law, the offenses for which an attorney may be removed and the means of proceeding against an attorney. *Ex parte Secombe*, 60 U.S. 9 (1857).

The basic statutory framework for the admission and discipline of attorneys in New York State is found in Judiciary Law § 90 (Petitioner's App., 14a). Judiciary Law § 90(7) gives the Appellate Division the power to appoint any attorney to conduct a preliminary investigation and to prosecute any disciplinary proceeding. § 691.4 of the Rules of Conduct of Attorneys (Petitioner's App., 33a) provides for the appointment of the grievance committees in the Second Judicial Department.

Petitioner was served with five complaints of professional misconduct by respondent and was given the opportunity to submit answers to each. He did so, and in each provided false and misleading information. Thereafter, the investigations conducted by respondent afforded petitioner several opportunities to testify regarding his conduct in each of the real estate transactions underlying the complaints. Petitioner did so, and provided false and misleading testimony under oath during his appearances. Following a thorough and lengthy investigation, respondent determined that there was sufficient cause to seek authorization from the Appellate Division for disciplinary proceedings against petitioner and two other attorneys involved in the underlying real estate transactions.

Based upon the application by respondent and opposition by petitioner, the Appellate Division reviewed the matters presented to it to determine whether there were sufficient grounds for the preferral of charges. Under similar circumstances, the New York State Court of Appeals decided that the Court on the Judiciary was not the accuser nor did it have an interest in the outcome of the case because it reviewed allegations to determine whether basis existed for preferral of charges. Far from prejudging the facts, the Court on the Judiciary merely determined whether as a matter of law there were facts sufficient to constitute grounds for the preferral of charges. *Friedman v. New York*, 24 N.Y. 2d 528, 543-544

(1969). This Court dismissed an appeal in that matter for want of a substantial federal question. *Friedman v. New York*, 397 U.S. 317 (1970).

The charges against petitioner were preferred by respondent through counsel designated by the court. The charges were heard by a Special Referee designated by the court to hear and report. Again, in *Friedman*, at 544, the Court of Appeals pointed out that because charges are preferred by counsel designated by the court, it cannot be assumed that the court became so intimately involved with the case as to deprive claimant of an impartial tribunal.

Further, in *Friedman*, at 544, the Court of Appeals held that,

> To the extent the Court on the Judiciary sits to supervise the conduct of the members of the Judiciary of this State, and like an administrative agency which may remove an employee for cause, where a combination of functions is traditional, so too that combination of functions may, consonant with due process, exist in the Court on the Judiciary.

It follows that to the extent that the Appellate Division sits to supervise the conduct of members of the bar a combination of functions may exist in that court consonant with due process.

If one were to accept the arguments as presented by petitioner, almost no administrative or disciplinary system could pass muster. Most have a combination of functions. This is not only true of the discipline of attorneys, on both the federal and state levels, but of the disciplinary systems involving civil service employees, physicians, real estate brokers, certified public accountants, notary publics and mortgage brokers, to name just a few.

This Court has also rejected the argument that the combination of investigative and adjudicative functions does not, without more, constitute a due process violation. *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Richardson v. Perales*, 402 U.S. 389 (1971); *Withrow v. Larkin*, 423 U.S. 35 (1975).

Petitioner has attempted through his numerous applications and appeals to create the "more" through various constitutional due process claims which have repeatedly been rejected. Petitioner's real motivation is that he disagrees with the order sustaining nineteen charges of professional misconduct and that he was disbarred for that misconduct.

Petitioner's blatant misstatement regarding the holding in *Matter of Mahot*, 222 N.Y. 8 (1917), to the effect that there is no appeal as of right in New York State, is an example of such creativity. Petitioner should be well aware of this since he was a plaintiff in *Thaler v. Casella*, 960 F. Supp. 691 (1997) wherein the court discussed that attorneys are entitled, pursuant to Judiciary Law § 90(8), as of right to appeal the outcome of a disciplinary proceeding, subject to the limitations prescribed in the New York State Constitution dealing with the jurisdiction of the Court of Appeals. *Thaler*, at 699. Article 6, § 3 of the New York State Constitution, in relevant part, gives jurisdiction to the Court of Appeals in civil cases and proceedings, as follows:

> (1) As of right, from a judgment or order entered upon the decision of an appellate division of supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

Petitioner brought an appeal as of right and it was dismissed by the Court of Appeals as that court determined that no substantial constitutional question was directly involved. *Matter of Falow*, 90 N.Y. 2d 1007 (1997).

II.

THERE WAS NO VIOLATION OF DUE PROCESS WHEN SPECIAL REFEREE JOHN A. MONTELEONE ISSUED HIS FINDINGS WITHOUT DEEMING IT NECESSARY TO CONDUCT ANY FURTHER HEARINGS.

The practice of law in the State of New York is a privilege, not a right. *Matter of Dondi*, 63 N.Y. 2d 331 (1984); *Matter of Capoccia*, 59 N.Y. 2d 549 (1983). An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including a fair notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544 (1968).

In the case at bar, petitioner had notice of the thirty charges of professional misconduct contained in the Petition served upon him. He was afforded a full and lengthy evidentiary hearing before the Special Referee George J. Balbach appointed by the Appellate Division "to hear and report, together with his findings upon each of the issues." Petitioner had the opportunity to refute any evidence produced by respondent and to cross-examine witnesses against him. He also had the opportunity to produce witnesses and introduce documents into evidence on his own behalf.

Following the unfortunate death of the Honorable George J. Balbach, by order of the Appellate Division, dated May 6, 1996, the issues raised by the Petition and Answer in this disciplinary proceeding were referred to the Honorable John

A. Monteleone, as Special Referee, to review the record of the proceedings before the late George J. Balbach, *to hold such further hearings, if any, as in his discretion are necessary to enable him to make findings* on the issues raised by the pleadings and to report his findings on the issues. (Emphasis added.)

Petitioner made no effort to object to this order or to seek a hearing *de novo* immediately following the issuance of the order of May 6, 1996.

Almost four months later, on August 30, 1996, the Honorable John A. Monteleone, issued his Report to the Appellate Division as he apparently did not find it necessary, in his discretion, to hold further hearings. What is most significant is that, during that time, petitioner who had continually and repetitively brought applications during the disciplinary proceeding, made no request to the Special Referee or to the Appellate Division for further hearings or to initiate a hearing *de novo*.

Petitioner apparently acquiesced in the order until confronted with the Report of the Special Referee which made findings against him.

There is no requirement that a successor Referee in a disciplinary proceeding must rehear the witnesses where the hearing has been concluded. While the court in *Matter of Shea*, 271 A.D. 594, 595 (1st Dept. 1946), chose to appoint a subsequent Special Referee to hold hearings, there is nothing mandating such a procedure.

The procedure of appointing a Special Referee to hold such further hearings as he deems necessary, upon the death of the Special Referee before whom a disciplinary proceeding was held, is not unique to petitioner's case. This is the same

procedure followed in the *Matter of Bruce*, 162 A.D. 2d 79 (1990). Mr. Bruce raised the same due process argument before the New York State Court of Appeals which dismissed his appeal on the basis that no substantial constitutional question was directly involved. *Matter of Bruce*, 77 N.Y. 2d 986 (1991).

Petitioner relies on Judiciary Law § 21 in support of the proposition that the Special Referee who rendered the Report should have heard and seen the witnesses. Petitioner's reliance is misplaced as Judiciary Law § 21 does not relate to the Appellate Division's authority in attorney disciplinary matters. Judiciary Law § 21 is limited to "a judge other than a judge of the court of appeals, or of the appellate division."

Petitioner has continually misrepresented the authority and role of a Special Referee in a disciplinary proceeding. Special Referees have no power to determine. *Mildner v. Gulotta*, 405 F. Supp. 182, 191 (1975), *aff'd*, 425 U.S. 901 (1975); *In re O'Neill*, 184 A.D. 2d 75 (1st Dept. 1918). It is the Appellate Division, pursuant to Judiciary Law § 90, which is the final arbiter of the facts and imposes whatever sanction is deemed appropriate. The Appellate Division is in no way bound by the findings of the Special Referee and must, itself, review the entire record. *Mildner*, at 194-196; *Belsky v. NYC Transit Authority*, 48 N.Y. 2d 908 (1979); *Ortiz v. Lesser*, 83 A.D. 2d 663 (1981).

The Appellate Division has not abdicated its responsibility simply because it has chosen to provide "the opportunity to be heard" before a Special Referee. For this reason, Special Referees in attorney disciplinary proceedings are not appointed to hear and determine. Rather, they are appointed to *hear and report* to the trier of fact, the Appellate Division.

The court in *Mildner v. Gulotta*, at 195, recognized that,

> The use of masters or referees as advisory triers-of-fact is a well-established instrument of busy appellate courts exercising original jurisdiction. The Supreme Court itself utilizes the practice when disputed factual issues appear in original actions.

The federal courts have recognized that due process does not demand under all circumstances that factual determinations be made by the person hearing the evidence. *United States v. Vater, et al.*, 259 F.2d 667, 672 (1959).

This Court in *United States v. Raddatz*, 447 U.S. 667 (1980) upheld a federal procedural mechanism which permitted a district court to refer a suppression motion in a criminal matter to a magistrate and authorized the district court to decide the motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations. The Court concluded that, even when the motion involved contested credibility assessments and was dispositive of the case, a *de novo* hearing before the district court was not constitutionally required.

A disciplinary proceeding is not a full-blown trial but an inquest, a gathering of facts concerning the conduct of an attorney, a subject more likely illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else. *Mildner v. Gulotta*, at 194. In the case at hand, even without considering the testimony of witnesses, there was an abundance of documentary evidence that proved respondent's intent and his misconduct.

In *D.M.W. Contracting Co. v. Stolz*, 158 F.2d 405 (1946), *cert. denied*, 330 U.S. 839 (1947) the District Court appointed

a master to take testimony upon the issues raised by the pleadings, to make findings and to report to the court. Before a report was made, the master died and his successor was directed to file his report based upon the existing record. The court issued a final judgment in which it adopted the findings of the master. The United States Court of Appeals upheld the procedure followed by the District Court and noted that there was no provision requiring the court to accept the report. The parties could file objections to the report, and request that the court take action upon the report. After a review of the entire record, the court could adopt the report, modify it or reject it in whole or part. It was the trial court which made the final determination of all issues, the report of the master was advisory only and without effect until the court took action. The federal court also concluded that the same result accrued whether or not the parties consented to the reference.

In *People v. Thompson*, 90 N.Y. 2d 615, *aff'g*, 222 A.D. 2d 156 (1997), the Court of Appeals reviewed the Appellate Division decision which held that it was proper for a judge in the middle of a criminal trial to be substituted for the original trial judge who had become incapacitated. The rationale underlying this decision is that it is the duty of the jury to find the facts and the judge is capable of carrying out the functions assigned to him such as making evidentiary rulings and charging the jury. The New York State Court of Appeals affirmed the order of the Appellate Division and noted that a jury trial before the same judge does not represent a nonwaivable common-law right.

Even the Federal Rules of Criminal Procedure provide for the substitution of a judge in a federal criminal trial when that judge becomes disabled or dies. Rule 25(a) provides:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced

> is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

Disciplinary proceedings are civil in nature and all of the constitutional rights afforded a criminal defendant do not apply. *Matter of Zuckerman*, 20 N.Y. 2d 430 (1967). Thus, if a judge in a criminal trial can be substituted without violating due process, then surely an attorney's due process rights are not violated when a Special Referee is substituted during a disciplinary proceeding where the trier of fact, the Appellate Division, which had original jurisdiction, reviewed the entire record. Based upon that review, nineteen charges of professional misconduct were sustained and petitioner's egregious conduct caused him to be disbarred.

III.

THERE WAS NO VIOLATION OF DUE PROCESS WHEN PETITIONER WAS DENIED EXAMINATION OF THE CONTENTS OF A FILE ALLEGEDLY MAINTAINED BY THE CLERK OF THE APPELLATE DIVISION NOR WERE TRANSCRIPTS IN OTHER PROCEEDINGS USED AGAINST PETITIONER.

Petitioner was afforded due process and had the opportunity to cross-examine the numerous witnesses called by respondent. Petitioner's references to transcripts of prior testimony by Howard M. Thaler and Lance H. Falow who were charged in companion disciplinary proceedings, are not only disingenuous but deliberate misrepresentations. He has failed in any of his many attempts to appeal his disbarment to cite any place in the record of the proceeding where this prior testimony was admitted.

These two witnesses were called by respondent as adverse witnesses and, when questioned regarding their prior testimony, they invoked the Fifth Amendment. Petitioner's attorney made no attempt to cross-examine these witnesses. Special Referee Balbach did not admit this prior testimony. In his Post-Trial Memorandum, petitioner argues that certain charges could not be sustained without this testimony.

Respondent, in its Proposed Findings and in its Reply to petitioner's Post-Trial Memorandum, addressed this issue and argued the admissibility of this evidence and that these witnesses had waived their Fifth Amendment privilege by testifying regarding these matters during respondent's investigations. Respondent, however, demonstrated that the only charge that could not be sustained without this prior testimony was Charge Thirty.

Special Referee Monteleone specifically considered this prior testimony only in regard to Charge Thirty and sustained that charge. The Appellate Division did not sustain any of the charges alleging conspiracy to defraud (Charges One, Six, Eleven, Twenty-One) including Charge Thirty. By raising this issue, petitioner clearly demonstrates his machinations in attempting to create due process questions for review.

Regarding an administrative decision suspending a physician from practice, this Court has held that such decision was not subject to a due process attack on the ground that immaterial and prejudicial evidence was introduced where nothing sustained the conclusion that the administrative agency relied upon such evidence. *Barsky v. Board of Regents*, 347 U.S. 442, 453-456 (1954). It is clear that in petitioner's case, such evidence was not admitted or relied upon.

Petitioner has continually raised the specter of a "private file," which he now designates "files maintained on him or used by the Appellate Division." He further claims that there was material including confidential records, *ex parte* communications and *ex parte* evidence which passed between respondent and the Appellate Division and that this may have been used against him.

Petitioner was given the opportunity to review respondent's file as reflected in the transcript of October 25, 1993, pp. 34-37. Petitioner has repeatedly pointed out that it would have no knowledge as to how files are maintained at the Appellate Division. Petitioner's misrepresentations regarding the nature of these records and his assumptions that they were used against him, is another example of his creativity in attempting to fabricate due process issues.

Petitioner was afforded due process. He was served with a Petition. The charges were heard before a Special Referee who had access only to the testimony, documents and other evidence presented by both respondent and petitioner. At the conclusion of the hearing, a Special Referee rendered a report based solely on the evidence presented. The entire record of the hearing was transmitted to the Appellate Division which made an independent assessment of the evidence, as required. Petitioner's real objection is that the Appellate Division found that the record supported a substantial number of the charges and further found that his conduct merited disbarment.

Petitioner alleges that respondent sent the file of his prior disciplinary proceeding in 1979 to the Appellate Division while a motion for interim suspension was pending. Respondent never had the file of the prior disciplinary proceeding against petitioner.

The prior disciplinary proceeding was prosecuted by the Grievance Committee for the Second and Eleventh Judicial Districts. Respondent had only some information from that prior proceeding obtained from the other grievance committee during the investigation of the complaints which form the bases of the charges which resulted in petitioner's disbarment. Such interchange of information between grievance committees is specifically authorized by § 691.6(d) of the Rules of Conduct of Attorneys, Appellate Division, Second Judicial Department.

Respondent did make an application during the investigation of the complaints of professional misconduct for an order to disclose pursuant to Judiciary Law § 90(10) in the form and manner prescribed by the Appellate Division. At that time there were no parties and no disciplinary proceeding pending. Petitioner has pugnaciously ignored the statutory authority for such an order. He also continues to make assumptions regarding the nature of such application and that it was later used against him. While disclosure pursuant to Judiciary Law § 90(10) must be for good cause, such good cause goes to the merits of the application to disclose and not the merits of any potential future application or proceeding.

The evidence against petitioner is that which appears in the record of the disciplinary proceeding at which he was a participant and at which he was represented by counsel. Petitioner has repetitively argued that some information may have been considered by the Appellate Division or the Special Referee which is outside the record of that proceeding. A review of the record, the Report of the Special Referee and the decision of the Appellate Division clearly demonstrate the absurdity of petitioner's position.

Petitioner also claims that he was not given the opportunity to establish affirmative defenses set forth in his answer. This is

likewise patently absurd. The issues regarding alleged "private files" and alleged improper *ex parte* communications were fully litigated in motions and applications before the Special Referee and the Appellate Division, in applications for interlocutory appeals to the Court of Appeals, and in appeals following petitioner's disbarment. Petitioner's attempts to call as witnesses, the attorneys for respondent, the attorney for another grievance committee and a clerk of the Appellate Division were blatant attempts to *inter alia* further delay the disciplinary proceeding, obtain materials with which he and his attorneys had already been provided, and to possibly disqualify counsel to respondent by making them witnesses on his behalf. Petitioner simply disagrees with the rulings of the Special Referee and the Appellate Division and has attempted to transpose these into a denial of due process.

IV.

THE STANDARD OF PROOF IN A DISCIPLINARY PROCEEDING IN NEW YORK IS APPROPRIATE TO THE INTEREST AT STAKE.

Petitioner argues that as a matter of sound public policy this Court should require clear and convincing evidence in all disciplinary cases in order to afford due process. He urges this in view of what he sees as rampant prejudice against the legal profession.

The New York Court of Appeals has held that disciplinary proceedings are to be determined upon a fair preponderance of the evidence and reasonable inferences to be drawn therefrom. *Matter of Capoccia*, 59 N.Y. 2d 549 (1983); *In re Friedman*, 196 A.D. 2d 280 (1st Dept. 1994), *appeal dismissed*, 83 N.Y. 2d 888 (1994), *cert. denied*, 513 U.S. 820 (1994).

Such charges have long been established based on a fair preponderance of the credible evidence. *In re Feola*, 37 A.D. 2d 654 (3rd Dept. 1971); *Matter of Andrews*, 184 A.D. 2d 195 (1st Dept. 1992); *Matter of Friedman*, 196 A.D. 2d 280 (1st Dept. 1994); *A to Z Assocs. v. Cooper*, 161 Misc. 2d 283 (1993).

Indeed, in *Matter of Mogil*, 88 N.Y. 2d 729 (1996), Mogil was charged with making misleading and false statements in connection with the Commission on Judicial Conduct's investigation of his misconduct. The Court of Appeals determined that judicial misconduct was proven by a preponderance of the evidence.

The cases on which petitioner rely involve the denial of personal or liberty interests: civil commitment for a mental disease, *Addington v. Texas*, 441 U.S. 418 (1970); termination of parental right, *Santosky v. Texas*, 455 U.S. 745 (1982); detention without bail in a criminal case, *United States v. Salerno*, 481 U.S. 739 (1987); terminating life-sustaining treatment to an incompetent person in a vegatative state, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

Furthermore, in petitioner's case, respondent demonstrated that, even if it should be determined that the clear and convincing standard were to apply, this standard requires that the evidence makes it highly probably that what is claimed is what actually happened. *Ausch v. St. Paul Fire Ins.*, 125 A.D. 2d 43 (2d Dept. 1987). *Orbit Holding Corp. v. Anthony Hotel Corp.*, 121 A.D. 2d 311 (1st Dept. 1986), lays out what must be proven by that standard:

> that a representation of a material fact was made; that such representation was false, and known to be false by the party making it, or was recklessly made; that such representation was made to deceive and

> to induce the other party to act upon it; and that the party to whom the representation was made relied upon it to its injury or damage.

Respondent, in its Proposed Findings, demonstrated that with each charge involving fraud the evidence presented clearly and convincingly proved these elements.

Petitioner's public policy argument is, likewise, without merit. To afford attorneys a higher form of protection than that afforded to others facing charges in disciplinary systems in New York would further enhance the suspicion with which the legal provision is viewed. This is particularly true since fostering of the attorney/client privilege and protection of a client's confidences and secrets often limit the existence of corroborating evidence. Although, in petitioner's case there was overwhelming evidence to sustain the charges, even apart of the testimony of witnesses.

Petitioner erroneously argues that, since no monetary damages were shown, no wrongdoing occurred. This is not a necessary element of proof in an attorney disciplinary proceeding. The issue is the integrity and fitness of an individual to practice as a member of the bar not the redress of private rights. *Ex parte Wall*, 107 U.S. 265 (1882).

The damage that was amply demonstrated by the various charges sustained against petitioner was the abuse of the trust and confidence reposed in respondent by clients, third parties, courts and other members of the bar. Such misconduct goes to the very heart of the profession and reflects negatively on respondent's fitness to practice law.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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